The taking of the money on this occasion is common ground in the case. The one point raised was: should the Magistrate have accepted the accused's story that this was what I would call a token acceptance, and that in the previous year he had accepted and returned a smaller gift, and that upon this occasion he had also accepted this gift with the object of not offending Cheah or his mother, and that it was his intention of returning the gift.

Wherever there has been conflict in the evidence of witnesses, Cheah has been disbelieved and the accused believed.

The Magistrate has found that the accused was inveigled into going into Cheah's house on the morning when the money was handed over, and that Cheah had arranged with the police to come and see the $30/- handed over. No evidence whotsoever was brought to show that accused expected to receive the $30/-.

The accused, as the Magistrate has said again and again has raised a doubt as to whether his story was not correct, and I think that when the Magistrate is left in that state of mind, then he must say that the accused has tilted the scale of probability in his own favour; the probability that what he accepted was a token acceptance which he meant to return.

I think on the evidence, and particularly on the Magistrate's finding, that he believed the accused—that he would have accepted the accused's evidence had the accused been an independent person—shows that the accused had made an impression on him that he was a witness of truth. I think in the face of this evidence and the impressions of the Magistrate, we must say that he had such a reasonable doubt in his own mind that he ought not to have convicted the accused. For these reasons we allow the appeal.

Appeal allowed.

[APPELLATE CIVIL JURISDICTION]
LAVILLE, J.
December 31, 1939.

MOONA SEENA MUTHUKARAPPA CHETTIAR — Plaintiff Appellant

v.

1. LOW TIN POH
2. PANG KING KEE — Defendants Respondents

[CIVIL APPEAL No. 2 of 1939]

Civil Procedure Code, Section 129—Trial of Action in Magistrate's Court—Procedure where no Statement of Defence delivered.

In an action brought on a Promissory Note the two defendants appeared and contested the claim but did not signify the nature of their defence. The plaintiff failed to satisfy the Magistrate that the defendants, or either of them, were the makers of the note and the claim was accordingly dismissed.

Held, on appeal, that as the Court had failed to ascertain from the defendants which allegations of fact they denied, the trial of the action had been irregular and that the plaintiff was therefore entitled to a new trial. Section 129 of the F.M.S. Civil Procedure Code considered and explained.

MAGISTRATE'S CIVIL APPEAL.

The facts and arguments sufficiently appear from the Judgment.

Dato Roland Braddell (*C. G. Toh* with him) for plaintiff-appellant.

Goho for defendant-respondents.

Cur. Adv. Vult.

Laville, J.—This is an appeal against the judgment of the 2nd. Magistrate, Johore Bahru in J.B. Civil Suit No. 42 of 1939. In that suit plaintiff M.S. Muthukarappa Chettiar a moneylender sued Low Tin Poh and Pang King Kee for money due on a P/N amounting to $841.20. At the hearing both parties were represented by counsel. Plaintiff appeared by his attorney R.M. Meyappa Chettiar and defendants in person. The P/N was executed on 5th March, 1936 for the sum of $600/- bearing interest at 24%.

The plaintiff's plaint sets forth

(1) that he is P/A of Plaintiff and thereby authorised to file the plaint
(2) plaintiff's trade and address
(3) defendants' business and residence
(4) details of the P/N on which he sues and the fact that a copy marked "A" is annexed to the plaint
(5) interest already paid thereon
(6) amount still due
(7) claim for amount due, further interest, any other relief, costs.

The summons and copy of plaint was served on defendants' solicitors on 28.2.39. No statement of defendant's case was filed and the suit came up for disposal on 26.3.39. The Magistrate's record shows that counsel and parties were present and that plaintiff's counsel opened his case and tendered P/N Ex: "A" which was then put in and marked "A". He then called MEYAPPA CHETTIAR the P/A of plaintiff to give evidence.

Meyappa produced his P/A and stated the P/N "A" had been handed over to him by the previous agent, gave details of the P/N and stated where each defendant lived: said he made demand for payment: 2nd. defendant on 16.5.38 paid $20/- interest: no further payment made: gave arithmetical details of claim and left rate of interest to the Court. There was no cross-examination, and plaintiff closed his case. Counsel for defendants then submitted there was no case for his clients to meet because (1) no evidence that either defendant signed the P/N as plaintiff's witness only because agent in 1938 and had not seen the signatures made and called no evidence to say defendants signed it. (2) but accepting the evidence of payment of $20/- it could not be appropriated to the P/N. Plaintiff's counsel in reply said correct presumption is that defendants signed the P/N and that valuable consideration was given. (3) the signatures had not been challenged by defendants counsel: Court should presume signatures are defendants'.

The learned Magistrate held that it was the duty of plaintiff to prove that the signatures on the P/Ns were those of defendants and that plaintiff's evidence did not do so and therefore his claim failed, and gave judgment accordingly.

Plaintiff appealed on the ground that the case had been improperly tried in that the provisions of Sec. 129 of the Civil Procedure Code had not been complied with by the Magistrate. (2) there was evidence before the Court on which it should have held that each of the defendants was a maker of the P/N sued upon.

As to the first ground of appeal there is no doubt that the provisions of Sec. 129 of the Civil Procedure Code have not been complied with. That section is an imperative one and enjoins on the Court the duty of settling the issues to be tried, by ascertaining what facts alleged in the plaint are admitted or denied by the defendants, and what facts alleged by the defendants in his written statement (if any) are admitted or denied by the plaintiff, and to record such admissions or denials.

In the suit under consideration the Magistrate has signally failed to do so. There is no record even that the claim is denied by the defendants, and no clarification of issues as required by the Civil Procedure Code, and as a result the trial has been defective from the beginning. The object of Section 129 is to shorten proceedings by relieving the plaintiff from the necessity of proving every fact he alleges, and allowing him to prove only those facts in his case which the defendant denies, and so also in regard to the defendant's case and I am afraid that non-compliance with the provisions of Sec. 129 of the Civil Procedure Code is far from uncommon in the Courts and I would call the urgent attention of Magistrates to the provisions and also to the imperative nature thereof.

In view of the above the argument as to whether the tendering of the P/N at the outset of the case without objection by the defendants amounted to an admission that it was signed by them does not require decision, but I would add that in my view the proper time at which it should have been tendered and admitted was during the evidence of the plaintiff.

I allow the appeal and set aside the order of the Magistrate and direct that the suit be tried *de novo*, the costs of the appeal to be borne by the defendants in any event and the costs of the original trial and the new trial to abide by the result of the new trial.

New trial ordered.